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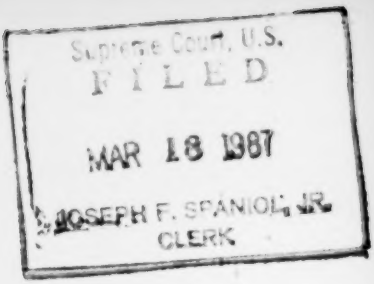

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. _____

GARY W. REKLAU, On Behalf of Himself and All Others Similarly Situated,

Petitioners,

v.

MERCHANTS NATIONAL CORPORATION, ET AL.

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. The principal question presented is whether the federal courts should imply an individual private cause of action under ERISA in order to allow a plan participant who has been denied a vested pension to challenge a tax qualified plan which discriminates in operation because of high rank and file employee turnover.

2. The secondary question presented is whether a federal court of appeals must make the four part analysis established by this court in *Cort v. Ash*, *infra*, rather than rejecting a private cause of action under ERISA out of hand and without sufficient factual and legal analysis.

LIST OF PARTIES

The parties to the proceedings below were the petitioner, Gary W. Reklau, an individual, and the class certified by the District Court on the 22nd day of March, 1985, consisting of all persons who have been employees of Merchants National Bank & Trust Company for at least One Thousand (1,000) hours in any year after July 1, 1975 and who (1) left employment at the bank without ever having ten (10) years of employment service; and (2) are still employed at the bank as of the date of filing the complaint did not have as yet ten (10) years of employment service.

The respondents before this court are Merchants National Corporation, an Indiana one bank holding company, Merchants National Bank & Trust Company of Indianapolis, a national bank, individually and as trustee and Merchants National Bank & Trust Company of Indianapolis Employees' Pension Plan.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The petitioner, Gary W. Reklau, on behalf of himself and all others similarly situated, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit, entered in the above-entitled proceedings on December 23, 1986.

OPINIONS BELOW

The opinion of the Court of Appeals for the Seventh Circuit is reported at 808 F.2d 628 and is reprinted in the appendix hereto, p. A-2, *infra*. The Entry (memorandum decision) of the United States District Court for the Southern District of Indi-

ana (Dillin, D.J.) was not reported by direction of the district judge. It is reprinted in the appendix hereto, p. A-11 a, *infra*.

JURISDICTION

Petitioner invoked district court jurisdiction under the Employee Retirement Income Security Act of 1974 (ERISA) 29 U.S.C. §1132(a)(3) and brought this action in the Southern District of Indiana. On October 11, 1985, the District Court granted respondents' motions for summary judgment in effect dismissing petitioner's case. See p. A-20 a, *infra*.

Upon petitioner's appeal, the Seventh Circuit, on December 23, 1986, entered a judgment and an opinion affirming the Southern District's order that petitioner's complaint be dismissed having found petitioner had no private right of action under ERISA. No petition for rehearing was sought.

The jurisdiction of this court to review the judgment of the Seventh Circuit is invoked under 28 U.S.C. §1254(1).

STATUTE INVOLVED

28 U.S.C. §1291. Final decisions of district courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be heard in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295.

STATEMENT OF THE CASE

Gary W. Reklau (Reklau) is a former assistant vice president and branch manager of Merchants National Bank & Trust Company of Indianapolis (the Bank). After almost nine years, he was fired from the Bank after false accusations concerning

the handling of branch funds. A state court jury awarded Reklau $132,500.00 in a defamation action against the Bank.

Reklau was denied a vested pension after he was fired because he had not been an employee of the Bank and participant in its Plan for ten (10) years. Reklau filed an action in the District Court under the Employee Retirement Income Security Act of 1974 (ERISA). 29 U.S.C. 1132(a)(3) gives district courts jurisdiction to hear ERISA cases.

The thrust of the complaint was that the tax qualified pension plan discriminated in its operation because of high employee turnover. The District Court granted Reklau's motion to have the case certified as a class action. The Reklau/class thus requested that the District Court (a) declare the plan discriminatory; (b) enjoin the defendants from continuing the discrimination and (c) fashion equitable relief to remedy the past violations.

The respondents filed a motion for summary judgment asserting the District Court did not have jurisdiction to hear a suit alleging discrimination in operation of a plan qualified under I.R.C. §§401, 410, 411 and 412. Petitioners filed an affidavit in opposition to the summary judgment setting out statistics showing an 80% turnover of all bank employees since the 1974 passage of ERISA. The District Court did not hold a hearing or oral argument on the motion for summary judgment or even mention the Reklau/class affidavit but filed an entry and separate judgment dismissing the complaint.

The District Court and the Court of Appeals admit that the legislation known as ERISA was passed after ten years of congressional study and is a comprehensive and integrated statute passed to guarantee employees with long years of service a vested pension. Having said that, however, both the District Court and the Court of Appeals only focus in upon one section of the internal revenue code. Both courts thus state categorically, but out of context, that the tax qualification section of the code, 26 U.S.C. §401, is not a part of ERISA.

Thus the courts failed to appreciate or address the fact that the tax and labor law provisions of ERISA are indeed coordinated with and incorporate by reference the provisions of the internal revenue code dealing with qualified retirement plans which predate the passage of ERISA. All of these provisions are coordinated with our national policy of encouraging retirement and retirement savings. The District Court and the Court of Appeals simply dissected the Internal Revenue Code from ERISA and focused upon one paragraph, §401, without appreciating that it is part of an integrated whole.

The District Court and the Court of Appeals thus found (1) plan participants have no right to challenge discrimination in the operation of a tax plan as prohibited by section 202 of ERISA and §§401 and 411 of the code and (2) there is no private right of action implied under ERISA for a participant to challenge discrimination in operation.

The Court of Appeals stresses that tax qualification is not mandatory so a sponsoring employer has an option to accept the tax benefits or not. Having accepted the benefits, however, a plan must comply with the integrated code provisions. After initial qualification, a plan must not discriminate in operation. The Court of Appeals fails to address the realities of plans which seek and accept the tax benefits or address the different rights of participants in a non tax qualified plan and a tax qualified plan.

It should be noted that Section 202 of ERISA, 29 U.S.C. §1202 sets out procedures with respect to continued compliance with internal revenue requirements relating to participation, vesting and funding standards. Section 1202(c) authorizes that Treasury Regulations issued under Code Sections 410(a), 411 and 412 of Title 26 (relating to minimum participation standards, minimum vesting standards and minimum funding standards, respectively) will also apply to the minimum participation, vesting and funding standards set forth in ERISA. The text of Section 202(c) of ERISA is set out below.

"29 U.S.C. 1202(c)

§1202. *Procedures with respect to continued compliance with Internal Revenue requirements relating to participation (IRC 410), vesting (IRC 411), and funding (IRC 412) standards*

. . .

(c) Extended application of regulations prescribed by Secretary of Treasury relating to minimum participation standards, minimum vesting standards, and minimum funding standards

Regulations prescribed by the Secretary of the Treasury under sections 410(a), 411, and 412 of Title 26 (relating to minimum participation standards, minimum vesting standards, and minimum funding standards, respectively) shall also apply to the minimum participation, vesting, and funding standards set forth in parts 2 and 3 of subtitle B of subchapter I of this chapter. Except as otherwise expressly provided in this chapter, the Secretary of Labor shall not prescribe other regulations under such parts, or apply the regulations prescribed by the Secretary of the Treasury under sections 410(a), 411, 412 of Title 26 and applicable to the minimum participation, vesting, and funding standards under such parts in a manner inconsistent with the way such regulations apply under sections 410(a), 411, and 412 of Title 26.

Sections 411 and 401 of Title 26 provide for minimum vesting standards. Sections 411 and 401 as well as ERISA's 29 U.S.C. §1053(a)(2)(A) *authorize ten-year cliff vesting as being legal in the first instance.* The courts apparently reasoned that since section 1202(c) does not specifically mention Code section 401, therefore, §401 is not a part of ERISA.

The courts failed, however, to address Code section 411(d)(1) which refers to and incorporates §401 set out as follows:

"Special rules. —

(1) Coordination with section 401(a)(4). — A plan which satisfies the requirements of this section shall *be treated as satisfying any vesting requirements resulting from the application of section 401(a)(4) unless* —

> (A) *there has been a pattern of abuse* under the plan (such as a dismissal of employees before their accrued benefits become nonforfeitable) tending to discriminate in favor of employees who are officers, shareholders, or highly compensated, or
>
> (B) there have been, or there is reason to believe there *will be, an accrual of benefits or forfeitures tending to discriminate in favor of employees who are officers, shareholders, or highly compensated.*" (Emphasis added).

It is thus clear that Code §401 is in fact incorporated by reference into the continued compliance provisions of ERISA as specifically referred to and integrated into ERISA by 29 U.S.C. §1202(c). The Court of Appeals thus ignored the clear and obvious provisions of ERISA and the Code.

The error of the District Court was adopted and quoted by the Court of Appeals:

> "There is no basis, under §1202(c) or elsewhere in ERISA, to find that the provisions of IRC §401 — which relate solely to the criteria for tax qualification under the Internal Revenue Code — are imposed on pension plans by the substantive terms of ERISA."

Having compounded and followed the District Court's superficial analysis of the statutes, the Court of Appeals stated "we are convinced that had Congress intended that §401 of the I.R.C. be applicable to ERISA, it would have so stated in clear and unambiguous language as it did in 29 U.S.C. §1202(c) with §§410(a), 411 and 412 of the I.R.C.[9] We thus refuse to read §401(a) of the I.R.C. as applicable to ERISA."

The Court of Appeals thus rejected out of hand a private right of action and affirmed the District Court's dismissal of petitioners' complaint. The Court of Appeals admits in a footnote that Code §411 is applicable to ERISA but ignores §411(d)(1) which coordinates with and specifically incorporates Code §401.

REASONS FOR GRANTING THE WRIT

I.
THERE IS SUBSTANTIAL PUBLIC ISSUE OF GREAT IMPORTANCE INVOLVING AN UNANSWERED QUESTION OF FEDERAL LAW INVOLVED IN THIS PROCEEDING

The issue in this proceeding — the power of the Federal Courts to grant relief under ERISA — goes beyond Reklau, the class of employees and the modest sized regional bank in this case. This proceeding involves a substantial public issue of great importance.

The Court of Appeals has closed the door of the Federal Courts to discrimination in operation suits. The Bank and Plan argued, and the Court of Appeals adopted, the proposition that the IRS staff has the exclusive power to bring actions to remedy discrimination in the operation of tax qualified plans. The IRS, however, only has four (4) persons in Indiana to audit the sixteen thousand two hundred qualified pension plans in the State of Indiana.

Individual participants, therefore, must be allowed to supplement IRS enforcement in order to challenge plans which discriminate in practice. Otherwise, literally thousands of rank and file Indiana employees will never receive vested benefits. Surely, Congress did not intend to limit access to the Federal District Courts in this class of cases. A decision written by this Court upon granting the writ will have a great impact in developing appropriate remedies for the enforcement of ERISA.

It is clear that Congress, in passing ERISA, was concerned because the employer contributions are tax deductible in qualified pension plans. Consequently the country's pension plans substantially affect the revenues of the United States. Congress found, however, in its declaration of policy that in spite of the popularity of qualified pension plans (because of the tax deductibility of contributions) many employees with long years of employment lost benefits because of a lack of vesting

provisions. The following excerpts from the Congressional findings and declaration of policy as found in 29 U.S.C. §1001 indicate Congress' concern:

> "The Congress finds that the growth in size, scope, and numbers of employee benefit plans in recent years has been rapid and substantial; . . . *that the continued well being and security of millions of employees and their dependents are directly affected by these plans; . . . that they substantially affect the revenues of the United States because they are afforded preferential Federal tax treatment*; that despite the enormous growth in such plans *many employees with long years of employment are losing anticipated retirement benefits owing to the lack of vesting provisions in such plans*; . . . and that it is therefore desirable in the interests of employees and their beneficiaries, for the protection of the revenue of the United States and to provide for the free flow of commerce, that *minimum standards be provided assuring the equitable character of such plans* and their financial soundness.
>
> . . . .
>
> It is hereby further declared to be the policy of this Act *to protect . . . the Federal Taxing power, and the interests of partipants in private pension plans* and their beneficiaries by *improving the equitable character* and the soundness of such plans by *requiring them to vest the accrued benefits of employees with significant periods of service. . .*" (Emphasis added.)

In passing ERISA, Congress clearly intended that enforcement would be by the Secretaries of the Treasury and Labor as well as by individual participants and beneficiaries. This intention on the part of Congress is set out in the statement of the Chairman of the Senate Committee on Labor and Public Welfare upon introducing the conference report. *U.S. Code Cong. & Ad. News*, Vol. 3, 93rd Cong-2d Sess., page 5177 at 5187 and 5188:

> "One of the most important issues dealt with by the conferees was the allocation of responsibility between the

> appropriate administrative agencies for the administration and enforcement of the bill's substantive provisions. Under the conference substitute, a significant role will be accorded in the administration of the participation, vesting and funding standards to both the Department of Labor and, in the case of plans which seek tax qualification, to the Internal Revenue Service.
>
> * * *
>
> Since it is probable that in view of the new requirements almost all pension plans will seek tax qualification, the conference substitute, in effect accords the basic responsibility with respect to participation, vesting and funding to the Internal Revenue Service."
>
> * * *
>
> "In addition to being able to request the Secretary of Labor to bring suit on their behalf in cases where benefits are denied in violation of the act, *individual participants and beneficiaries will also be able to bring suit in Federal court in such instances. . . .*" (Emphasis added.)

The grant of federal jurisdiction is set out in 29 U.S.C. §1132. It should be noted that §1132(G) of 29 U.S.C. also provides for attorneys' fees.

ERISA is thus another example of federal legislation authorizing private enforcement of federally guaranteed rights. The fact that Congress also authorized attorneys' fees under ERISA, as well as the procedural provisions of Rule 23 FRCP, provide additional incentive for the private bar to enforce federally guaranteed rights.

These actions have come to be known as "private attorney general litigation". The concept of private attorney general cases in the context of attorneys' fees and Rule 23 class actions have been commented upon favorably by this Court on a number of occasions.

In the case of *Alyeska Pipeline Service Company v. Wilderness Society, et al.*, 421 U.S. 210, 97 S.Ct. 1612 (1975), the Court stated at page 263:

"It is true that under some, if not most, of the statutes providing for the allowance of reasonable fees, Congress has opted to rely heavily on private enforcement to implement public policy and to allow counsel fees so as to encourage private litigation. Fee shifting in connection with treble-damages awards under the antitrust laws is a prime example; cf. *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 265-266, 92 S.Ct. 885, 892-893, 31 L.Ed.2d 184 (1972); and we have noted that Title II of the Civil Rights Act of 1964 was intended 'not simply to penalize litigants who deliberately advance arguments they know to be untenable but, more broadly, to encourage individuals injured by racial discrimination to seek judicial relief under Title II.' *Newman, supra*, 390 U.S. at 402, 88 S.Ct., at 966 (footnote omitted)."

In *Hawaii v. Standard Oil Company*, cited in *Alyeska* (*supra*), the Court said at page 266:

"*Congress has given private citizens rights of action for injunctive relief and damages for* antitrust violations without regard to the amount in controversy. 28 U.S.C. 1337; 15 U.S.C. §15. *Rule 23 of the* Federal Rules of Civil Procedure provides for class actions *that may enhance the efficacy of private actions by permitting citizens to combine their limited resources to achieve a more powerful litigation posture.*" (Emphasis added.)

In *Newman v. Piggie Park Enterprises, Inc., et al.*, also cited in *Alyeska* (*supra*), 390 U.S. 400, 99 S.Ct. 964, 19 L.Ed.2d 1263 (1968), the court said at page 401, 402:

"When the Civil Rights Act of 1964 was passed, it was evident that enforcement would prove difficult and that *the Nation would have to rely in part upon private litigation as a means of securing broad compliance with the law.* A Title II suit is thus private in form only. (402) When a plaintiff brings an action under that Title, he cannot recover damages. If he obtains an injunction, he does so not for himself alone but also as a '*private attorney general*', *vindicating a policy that Congress considered of the highest priority.*" (footnotes omitted) (Emphasis added.)

This court has also commented on private attorney general litigation as well as its relationship to Rule 23 in the case of *Deposit Guaranty National Bank v. Roper, et al.*, 445 U.S. 326, 100 S.Ct. 1166, 63 L.Ed.2d 427 (1980) reh. den. 446 U.S. 947, 100 S.Ct. 2177 (1980). In that case, the Court said at page 338:

> *"For better or worse, the financial incentive that class actions offer to the legal profession is a natural outgrowth of the increasing reliance on the 'private attorney general' for the vindication of legal rights; obviously this development has been facilitated by Rule 23."* (Emphasis added.)

This Court can take judicial notice of the fact that neither the Department of Labor nor the Internal Revenue Service have the manpower to effectively enforce the discrimination in operation provisions. Why shouldn't participants who are named in the jurisdictional grant in ERISA be allowed to bring such actions? In *Newberg On Class Actions*, 2nd Ed., the author points out the historical objectives of class actions. He points out that enforcement or deterrence is a primary objective. The courts have thus recognized that such procedures afford remedies for injuries which are not adequately or effectively remedied by agencies of government.

> "In the *Alyeska Pipeline* case, the Supreme Court noted when Congress passes a law and authorizes a private right of action, with reimbursement of attorneys' fees in successful suits, Congress is authorizing private attorney general litigation to enforce such laws and to deter violations. In both the *Roper* and *Geraghty* opinions, the Supreme Court also recognized that the right to have a class action certified in appropriate cases is more akin to the right to maintain private attorney general litigation than to the traditional requirements to demonstrate a personal stake in the outcome of the litigation, for purposes of avoiding mootness after a properly commenced lawsuit. This enforcement or deterrence objective of class actions, in addition to arising out of their private attorney general nature, is also supported by the recognition that class actions serve to afford remedies for injuries unremedied by the regulatory action of government, and they enhance the effectiveness of private

attorney general litigation that otherwise might be brought only on an individual basis." (*Newberg On Class Actions*, 2Ed, Vol. I §1.105)

II.

THE COURT OF APPEALS FAILED TO FOLLOW ESTABLISHED PRECEDENT AND MAKE THE ANALYSIS REQUIRED BY THIS COURT IN *CORT v. ASH*.

In the case of *Massachusetts Mutual Life Insurance Company, et al. v. Russell*, _____ US _____, 105 S.Ct. 3085, 87 L.Ed.2d 96 (1985), this court reaffirmed the analysis of whether an implied right of action is available when not expressly authorized which it fashioned in *Cort v. Ash*, 422 US 66, 95 S.Ct. 2080, 45 L.Ed.2d 26 (1975). In *Cort v. Ash*, this court said that in determining whether a private remedy is implicit in a statute not expressly providing one, several factors are relevant as follows: (1) Is the Plaintiff one of the class for whose especial benefit the statute was enacted? (2) Is there any indication of legislative intent, explicit or implicit, either to create such a remedy or deny one? (3) Is it consistent with the underlying purpose of the legislative scheme to imply such a remedy for the Plaintiff, and (4) Is the cause of action one traditionally relegated to state law as an area basically of concern to states so that it would be inappropriate to infer a cause of action based solely on federal law?

One of the cases relied upon to fashion the analysis in *Cort*, was the prior Supreme Court decision in *J.I. Case Co. v. Borak*, 377 US 426, 84 S.Ct. 1555, 12 L.Ed.2d 423 (1964). The *Borak* decision affirmed a Seventh Circuit decision as reported at 317 F.2d 838. *Borak* was one of the early cases establishing federal court jurisdiction to entertain private causes of action arising out of and implied under federal securities laws.

The petitioners case is very similar to *Borak*. In *Borak*, the Courts on appeal reviewed and determined the intent of Congress in passing securities legislation was to protect investors. The Court found the Securities Commission was unable to

police all proxy statements received. Available manpower did not permit an independent examination of the facts in each file. Private enforcement of proxy rules thus was necessary in order to supplement the action of the Securities and Exchange Commission. This Court thus stated in *Borak* that:

> "We, therefore, believe that under the circumstances here it is the duty of the courts to be alert to provide such remedies as are necessary to make effective the congressional purpose. As was said in *Sola Electric Co. v. Jefferson Electric Co.*, 317 US 173, 176, 87 L.Ed. 165, 168, 63 S.Ct. 172 (1942):
>
> "When a federal statute condemns an act as unlawful, the extent and nature of the legal consequences of the condemnation, though left by the statute to judicial determination, are nevertheless federal questions, the answers to which are to be derived from the statute and the federal policy which it has adopted."
>
> See also *Tunstall v. Brotherhood of Locomotive Firemen & Enginemen*, 323 US 210, 213, 89 L.Ed. 187, 193, 65 S.Ct. 235 (1944); *Deitrick v. Greaney*, 309 US 190, 201, 84 L.Ed. 694, 701, 60 S.Ct. 480 (1940). "It is for the federal courts 'to adjust their remedies so as to grant the necessary relief' where federally secured rights are invaded. 'And it is also well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for invasion, federal courts may use any available remedy to make good the wrong done.' *Bell v. Hood*, 327 US 678, 684, 90 L.Ed. 939, 944, 66 S.Ct. 773, 13 ALR2d 383 (1946)." (12 L.Ed.2d at 428)

This court granted certiorari and reversed the Court of Appeals for the Seventh Circuit in *Cannon v. University of Chicago*, 441 US 675, 99 S.Ct. 1946, 60 L.Ed.2d 560 (1979). In a very scholarly opinion, this court reviewed the history of implied rights of action created in federal legislation. In *Cannon*, the Seventh Circuit acknowledged the necessity of a *Cort v. Ash* analysis but made a very restricted analysis of Title IX which this court reversed. Thus, the determination of whether an implied right of action exists depends upon the factual circumstances of each case.

In *Massachusetts Mutual* this Court found that two (2) of the factors supported the claimed private remedy but the two (2) other factors in *Cort* pointed in the other direction.

In this case, four-part analysis contained in *Cort v. Ash* comes down on the side of implying a right of action for Reklau and the Class against the Plan which discriminates in operation because of high employee turnover:

1. In 1974 Congress created new rights in favor of plan participants. Reklau and his fellow employees are certainly in the class of persons for whose "especial benefit" ERISA was enacted.

2. The reading of ERISA and the Code, including legislative history, can only lead to the conclusion that the act was intended to create new remedies not available prior to the passage of ERISA.

3. The underlying purpose of ERISA is to protect employees in terms of guaranteeing employees with long years of service vested benefits which are properly funded and administered. Implying remedies to carry out the act's purpose of protection is both consistent and necessary.

4. The area of employee protection was preempted by the passage of ERISA. Employees were not previously protected under a checkerboard of differing and conflicting state laws. This is not an area where Federal Courts should defer to the states.

The Seventh Circuit has failed to follow the established law as announced by this court, in that it failed to examine the required factors.

CONCLUSION

How to enforce private pension rights created under ERISA is an area which should be addressed by this court. The Seventh Circuit has closed the door of the federal courts on any individual participant in a tax qualified pension plan who believes he or she has been denied a vested pension because of discrimination in the operation of the plan.

In passing ERISA, Congress clearly intended to protect workers. Congress gave the Secretaries of Labor and the Treasury enforcement powers under ERISA. In addition, Congress quite properly also provided that participants had concurrent enforcement powers. Congress gave jurisdiction to the United States District Courts and encouraged the use of the courts by providing for attorney's fees.

Congress thus created new rights to eliminate the pre-ERISA lack of enforcement provisions. The Seventh Circuit, however, like Captain Horatius at the bridge, appears to be guarding access to the federal courts. It took a very restrictive approach as if ERISA was never passed. While the motives of the Seventh Circuit may indeed be honorable, the end result is to frustrate the will of Congress and to deny the rights of injured plan participants.

The questions here are ones of national policy. If the national policy of the country, as announced by Congress in ERISA, is to protect workers with long years of service in terms of minimum participation, vesting and funding requirements, then these rights should be protected by the courts. If our national policy is to demand continued compliance by tax qualified plans, then the rights of workers who are discriminated against should be protected by the courts. If our national policy is to promote retirement savings by encouraging pension plans, then ERISA created rights should be protected by the courts.

History tells us, however, that there will be no meaningful enforcement of these federally created rights unless and until the courts encourage the formation of a plaintiff's bar. We need look only as far as the cases which have implied private rights of

action under federal law in the past 20 years in order to prove this proposition. There would be no meaningful enforcement of securities laws, of fair housing laws, of job discrimination laws, of educational discrimination laws, or other federally created rights without private enforcement.

The national policy for promoting pension plans and the individual's desire to protect his or her individual pension indeed coincide. Private enforcement is needed in order to provide a powerful tool to further the national policy. Otherwise, tax qualified pension plans in non union service industries will continue to be tax sheltered piggy banks for the benefit of the few with minimum benefits for the many. The questions raised in this petition for writ of certiorari should be addressed by this court.

Respectfully submitted,

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Appendix

IN THE

Supreme Court of the United States

October Term, 1986

GARY W. REKLAU, On Behalf of Himself
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MERCHANTS NATIONAL CORPORATION, et al.

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SHORT APPENDIX TO WRIT OF CERTIORARI

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In the

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

No. 85-2973

GARY W. REKLAU, On Behalf of Himself and all others Similarly Situated,

Plaintiffs-Appellants,

v.

MERCHANTS NATIONAL CORPORATION, A One Bank Holding Company, MERCHANTS NATIONAL BANK & TRUST COMPANY OF INDIANAPOLIS, A NATIONAL BANK, In Its Individual Capacity and As Trustee, and MERCHANTS NATIONAL BANK & TRUST COMPANY OF INDIANAPOLIS EMPLOYEES' PENSION PLAN,

Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division. No. IP 84-1389-C — S. Hugh Dillin, Judge.

ARGUED APRIL 9, 1986—DECIDED DECEMBER 23, 1986

Before Before WOOD, COFFEY, and RIPPLE, Circuit Judges.

COFFEY, Circuit Judge. Gary Reklau appeals the district court's grant of summary judgment of this call action in favor of Merchants National Corporation. We affirm.

I

The plaintiff, Gary Reklau, was hired on May 19, 1975, as a Management Trainee of the Merchants National Bank and Trust Company ("Bank") of Indianapolis, Indiana. The Bank is a wholly owned subsidiary of the Merchants National Corporation (the "Corporation"), a holding company for the bank. While employed with the Bank, Reklau advanced to the positions of Assistant Branch Manager, Branch Manager, and eventually was elected an officer of the Bank with the title of Assistant Cashier and later Assistant Vice-President. Until the date of his termination on April 16, 1984, the plaintiff participated in the Merchants National Bank and Trust Company of Indianapolis Employees' Pension Plan (the "Pension Plan" or "Plan").[1]

The Pension Plan was adopted as of July 1, 1983. Its purpose is to provide monthly retirement income to the employees of the Corporation's subsidiaries, including the Bank. The Corporation and all of its principal subsidiaries have become participating employers in the Pension Plan. The Pension Plan has been amended several times and it was revised effective January 1, 1976, and was again revised as of January 1, 1984, in an attempt to comply with the new requirements of the Employee Retirement Income Security Act of 1974 ("ERISA") and the Tax Equity and Fiscal Responsibility Act of 1982 ("TEFRA"), respectively.

In the late '70s or early '80s, the directors of the Corporation and the Bank adopted the Directors' Deferred Compensation Plan ("Directors' Plan") which in essence is a retirement plan for employees in the higher income brackets, significant shareholders, and directors of the Corporation. On October 18, 1983, the directors of the Bank adopted a proposal permitting the Bank to enter into supplemental pension benefit agreements (Plan Supplement) with "high officers" of the Bank. The Bank entered into this agreement on September 12, 1984.

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[1] The Corporation is the sponsoring employer of the Pension Plan. The Bank formerly occupied that position and is still the trustee of the Plan.

Under the terms of the Pension Plan, a participant's benefits are not completely vested until he has participated in the Plan for ten years.[2] The plaintiff had seven months "continuous service" under the terms of the pre-1976 Pension Plan. He was credited with eight years of "vesting service" after 1976, giving him a total of 8.58 years of vesting service in the Pension Plan at the time his employment was terminated. The plaintiff was neither a participant in the Directors' Plan nor the Plan Supplement.

In his complaint filed with the district court, the plaintiff[3] made several arguments, among them that the Pension Plan violates ERISA and the Internal Revenue Code ("I.R.C.") because the Plan discriminates in favor of executive employees, officers and substantial shareholders and other highly compensated employees of the Bank under §401(a)(4) of the I.R.C. The defendants moved for summary judgment, and the district court granted the motion pursuant to Rule 56(c) of the Federal Rules of Civil Procedure, finding no genuine issue of material fact. *Reklau v. Merchants Nat'l. Corp.*, No. IP 84-1389-C, Mem. Op. (S.D. Ind. Oct. 11, 1985). The plaintiff appeals the district court's grant of summary judgment raising two issues:[4] (whether §401(a)(4) of the I.R.C. should be incorporated into ERISA and 92) whether the plaintiff, as a participant in a Pension Plan, has a private cause of action under ERISA for alleged discrimination in favor of the executive employees,

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2 This is known as "ten-year cliff vesting."

3 On March 22, 1985, the district court granted plaintiff's motion to maintain a class action.

4 On appeal the plaintiff raises for the first time new issues in an attempt to create a genuine issue of material fact. Because the plaintiff failed to raise these issues before the district court, he is barred from raising them on appeal. In *Liberles v. County of Cook*, 709 F.2d 1122 (7th Cir. 1983), we stated:

> "It is a well-settled rule that a party opposing a summary judgment motion must inform the trial judge of the reasons, legal or factual, why summary judgment should not be entered. If it does not do so, and loses the motion, it cannot raise such reasons on appeal."

709 F.2d at 1126.

officers, and substantial shareholders and other highly compensated employees of the Bank in the operation of the Pension Plan as defined under §401(a)(4) of the I.R.C. We affirm.

II

A grant of summary judgment is proper if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c)[5]. We must construe the facts in this case in the light most favorable to the plaintiff since he was the party opposing the motion for summary judgment. *See O'Donnell v. CBS, Inc.*, 782 F.2d 1414, 1415 (7th Cir. 1986).

Reklau asserts in his brief that the district court improperly determined that:

> "[i]t was without authority to review the Pension Plan for the purpose of determining whether the Plan was discriminatory in practice. The opinion thus erroneously interpreted the provisions of ERISA and of the Internal Revenue Code and the relationship between the two."
>
> The plaintiff argues that the court's error was based on two "faulty suppositions": (1) that 29 U.S.C. §1202(c) makes treasury regulations promulgated under the I.R.C., 26 U.S.C. 410(a), 411 and 412 applicable to ERISA, but not §401 of the I.R.C. and (2) that §401 of the I.R.C. does not create any substantive rights that an individual can enforce as a participant or beneficiary under a tax qualified plan.
>
> a. Title 29, §1202 of ERISA sets out procedures dealing with continued compliance with Internal Revenue

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[5] Rule 56(c) of the Fed. R. Civ. P. provides in part:

> [T]he judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

requirements relating to participation, vesting, and funding of plans and trusts. The plaintiff attempts to employ 29 U.S.C. 1202(c)[6] as the touchstone for his allegations that the Pension Plan is violative of ERISA, as well as the I.R.C. Title 29, §1202(c) makes applicable to ERISA treasury regulations prescribed under 26 U.S.C. §§410(a), 411 and 412, none of which the plaintiff alleges the defendants violated in the present case. Reklau argues that since §401(a)(4) of the I.R.C.[7] is "coordinated" with §411(d)(1) of the I.R.C.[8] which is applicable to ERISA by

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[6] Section 1202(c) of Title 29 provides:

> Regulations prescribed by the Secretary of the Treasury under sections 410(a), 411 and 412 of Title 26 (relating to minimum participation standards, minimum vesting standards, and minimum funding standards, respectively) shall also apply to the minimum participation, vesting, and funding standards set forth in parts 2 and 3 of subtitle B of subchapter I of this chapter. Except as otherwise expressly provided in this chapter, the Secretary of Labor shall not prescribe other regulations under such parts, or apply the regulations prescribed by the Secretary of the Treasury under sections 410(a), 411, 412 of Title 26 and applicable to the minimum participation, vesting, and funding standards under such parts in a manner inconsistent with the way such regulations apply under sections 410(a), 411, and 412 of Title 26.

[7] Section 401(a)(4) of Title 26 provides:

> A trust created or organized in the United States and forming part of a stock bonus, pension, or profit-sharing plan of an employer for the exclusive benefit of his employees or their beneficiaries shall constitute a qualified trust under this section—
>
> (4) If the contributions or the benefits provided under the plan do not discriminate in favor of employees who are—
>
> (A) officers,
>
> (B) shareholders, or
>
> (C) highly compensated.

[8] Section 411(d)(1) of Title 26 provides:

> (1) A plan which satisfies the requirements of this section shall be treated as satisfying any vesting requirements resulting from the application of section 401(a)(4) unless—
>
> (A) there has been a pattern of abuse under the plan (such as a dismissal of employees before their accrued benefits become nonforfeitable) tending to discriminate in favor of employees who are officers, shareholders, or highly compensated, or
>
> (B) there have been, or there is reason to believe there will be, an accrual of benefits or forfeitures tending to discriminate in favor of employees who are officers, shareholders, or highly compensated.

virtue of 29 U.S.C. §1202(c), it should likewise be applicable to ERISA. The plaintiff fails to cite any case law to support this position. The Supreme Court has noted that "ERISA is a 'comprehensive and reticulated statute,' which Congress adopted after careful study of private retirement pension plans." *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 510 (1981). (Citation omitted). We agree with the district court's assessment of this issue:

> "There is no basis, under §1202(c) or elsewhere in ERISA, to find that the provisions of IRC §401 — which relate solely to the criteria for tax qualification under the Internal Revenue Code — are imposed on pension plans by the substantive terms of ERISA."

Reklau v. Merchants Nat'l. Corp., No. IP 84-1389-C, Mem. Op. at 8, (S.D. Ind. Oct. 11, 1985). We are convinced that had Congress intended that §401 of the I.R.C. be applicable to ERISA, it would have so stated in clear and unambiguous language as it did in 29 U.S.C. §1202(c) with §§410(a), 411 and 412 of the I.R.C.[9] We thus refuse to read §401(a) of the I.R.C. as applicable to ERISA.

b. The plaintiff also argues that the district court was in error in ruling that §401 of the I.R.C. does not create substantive rights under ERISA that can be enforced by an individual in a private cause of action as a participant under a tax qualified pension plan. The trial court cited several cases in support of its finding. *See, e.g., Cowan v. Keystone Employee Profit Sharing Fund*, 586 F.2d 888, 890 n.3 (1st Cir. 1978) ("This section [§401 of the I.R.C.] does not appear to create any substantive rights

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[9] As we previously noted, Title 29, §1202(c) clearly states that §§410(a), 411, and 412 of Title 26 are applicable to ERISA:

> Regulations prescribed by the Secretary of Treasury under sections 410(a), 411, and 412 of Title 26 (relating to minimum participation standards, minimum vesting standards, and minimum funding standards respectively) shall also apply to the minimum participation, vesting, and funding standards set forth in parts 2 and 3 of subtitle B of subchapter I of this chapter.

that a beneficiary of a qualified retirement trust can enforce."); *Wiesner v. Romo Paper Products Corp.*, 514 F. Supp. 289, 291 n.2 (E.D.N.Y. 1981) ("The sections relied on, 26 U.S.C. §§401, 404 and 503, do not create a substantive right that a beneficiary, participant or fiduciary could enforce."); *Vermeulen v. Central States, Southeast and Southwest Areas Pension Fund*, 490 F. Supp. 234, 237 n.6 (M.D.N.C. 1980) ("This court agrees with the First Circuit's holding in *Cowan v. Keystone Employees [sic] Profit Sharing Fund*, 586 F.2d 888, 890 n.3 (1st Cir. 1978)").

The plaintiff argues that all the acts or omissions complained of in the cases relied on by the trial court predate the enactment of ERISA. The relevant inquiry in those cases was whether §401 of the I.R.C. created any substantive rights that could be enforced by an individual as a participant or a beneficiary under a tax qualified pension plan. The decisions held that it did not. *See Cowan, Wiesner, Vermeulen.* Reklau has failed to explain how the passage of ERISA would require a different result in pre-ERISA cases the district court relied on to support its decision, nor has our review of the legislative history of ERISA revealed any intent on the part of Congress to alter the result in those cases. He has also failed to offer any case law that is in contradiction of the district court's finding on this issue. We hold that the district court's refusal to find an implied cause of action under §401 of the I.R.C. was proper.

III

We hold that the district court's finding that there was no genuine issue of material fact was proper. The decision of the district court in granting summary judgment is AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of
Appeals for the Seventh Circuit

JUDGMENT - ORAL ARGUMENT
UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

December 23, 1986.

Before

Hon. HARLINGTON WOOD, JR., *Circuit Judge*

Hon. JOHN L. COFFEY, *Circuit Judge*

Hon. KENNETH F. RIPPLE, *Circuit Judge*

GARY W. REKLAU, on Behalf of Himself and All Others Similarly Situated, *Plaintiffs-Appellants,*	)	Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division
No. 85-2973 vs.	)	
MERCHANTS NATIONAL CORPORATION, A One Bank Holding Company, MERCHANTS NATIONAL BANK & TRUST COMPANY OF INDIANAPOLIS, A National Bank, In its Individual Capacity and As Trustee, and MERCHANTS NATIONAL BANK & TRUST COMPANY OF INDIANAPOLIS EMPLOYEES' PENSION PLAN, *Defendants-Appellees.*	)	No. 84 C 1389 Judge S. Hugh Dillin

This cause was heard on the record from the United States District Court for the Southern District of Indiana, Indianapolis Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, with costs, in accordance with the opinion of this Court filed this date.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

GARY W. REKLAU, On Behalf of Himself and All Others Similarly Situated,	)	
Plaintiffs,	)	NO. IP 84-1389-C
v.	)	
MERCHANTS NATIONAL CORPORATION, A One Bank Holding Company, MERCHANTS NATIONAL BANK & TRUST COMPANY OF INDIANAPOLIS, A National Bank, In Its Individual Capacity and As Trustee, MERCHANTS NATIONAL BANK & TRUST COMPANY OF INDIANAPOLIS EMPLOYEES' PENSION PLAN,	)	
Defendants.	)	

ENTRY

This cause is before the Court upon the defendants' motions for summary judgment and to vacate the order certifying this cause as a class action. For the following reasons, the former motion is granted and the latter is rendered moot.

Background

Merchants National Bank & Trust Company of Indianapolis (the Bank) is a national banking association which has its principal place of business in Indianapolis, Indiana. It is the

former sponsoring employer of the Merchants National Bank & Trust Company of Indianapolis Employees' Pension Plan (the Pension Plan) and is the Trustee of the Pension Plan.

Merchants National Corporation (the Corporation) is a one bank holding company and Indiana corporation which operates the Bank as a wholly owned subsidiary. It is the sponsoring employer of the Pension Plan.

The Pension Plan was originally adopted as of July 1, 1938. Its purpose is to provide monthly retirement income for the employees of the Corporation's subsidiaries, including the Bank. The Corporation and all of its principal subsidiaries have become Pension Plan participating employers. The Pension Plan has been amended several different times. It was completely restated effective January 1, 1976, and again effective January 1, 1984, in attempts to comply with the requirements of the Employee Retirement Income Security Act of 1974 (ERISA), and the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA), respectively.

In the late '70s or early '80s, the directors of the Corporation and the Bank adopted the Directors' Deferred Compensation Plan (Directors' Plan), which essentially is a retirement plan for highly paid employees, significant shareholders, and directors of the Corporation.

On October 18, 1983, the directors of the Bank adopted a proposal which permitted the Bank to enter into supplemental pension benefit agreements (Plan Supplement) with "high officers" of the Bank. The earliest such agreement was entered into on September 12, 1984.

The plaintiff, Gary Reklau, was hired by the Bank as a Management Trainee on May 19, 1975. He worked there as an Assistant Branch Manager and Branch Manager, eventually being elected an officer of the Bank with the title Assistant Cashier, and later Assistant Vice-President. His employment with the Bank was terminated on April 16, 1984.

While he was employed by the Bank, the plaintiff participated in the Pension Plan. A participant's benefits under the

terms of the Pension Plan are not vested until ten years of participation are accumulated, after which time the participant is 100% vested. This is known as "ten-year cliff vesting." The plaintiff had seven months "continuous service" under the terms of the pre-1976 Pension Plan. He was credited with eight years of "vesting service" after 1976, giving him a total of 8.58 years of vesting service in the Pension Plan. The plaintiff never participated in the Directors' Plan or the Plan Supplement.

In his complaint, the plaintiff alleges that the ten-year cliff vesting provision of the Pension Plan violates ERISA and the Internal Revenue Code; that the Bank and the Corporation have an interest in delaying employee vesting for the longest permissible time (in order to take advantage of forfeitures and accrued interest), thus breaching their fiduciary duty to protect the interests of Reklau and those similarly situated; and that the Directors' Plan and the Plan Supplement violate ERISA.

On March 22, 1985, this Court granted plaintiff's motion to maintain a class action.

Discussion

In order for a motion for summary judgment to be granted there must be no genuine issue as to any material fact and the moving party must be entitled to judgment as a matter of law. Rule 56(c), F.R.Civ.P. On a motion for summary judgment, the burden of establishing the lack of any genuine issue of material fact is upon the movant and all doubts are to be resolved against him. *Yorger v. Pittsburgh Corning Corp.*, 733 F.2d 1215, 1218 (7th Cir. 1984). Moreover, the nonmovant's reasonable allegations are to be, as they have been, accepted as true for purposes of summary judgment. *Id.* at 1218-19.

Standing

Initially, we consider the defendants' contention that the plaintiff lacks standing to challenge the Directors' Plan and the Plan Supplement. The plaintiff brings this action pursuant to 29 U.S.C. §1132, the most applicable provision of which states that:

(a) A civil action may be brought—

. . .

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan; . . .

The plaintiff is obviously neither a beneficiary or fiduciary under any of the instant plans. A participant is defined

> as any employee or former employee of an employer, or any member or former member of an employee organization, who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer or members of such organization, or whose beneficiaries may be eligible to receive any such benefit.

29 U.S.C. §1002(7). ERISA, as a remedial statute, should be given a liberal construction in order to carry out the vitally important public policies of protecting the integrity of employee benefit plan assets and of deterring fiduciary violations. *Brink v. DaLesio*, 667 F.2d 420, 427 (4th Cir. 1981).

The plaintiff, having never been eligible for, or even associated with, either the Directors' Plan or the Plan Supplement, has no standing to challenge the legality of those plans, regardless of how broadly we construe the term "participant." *See Brink v. DaLesio*, 496 F.Supp. 1350, 1372-73 (D.Md. 1980), *rev'd on other grounds*, 667 F.2d 420 (4th Cir. 1981).

This disposition of the standing issue vis-a-vis the Directors' Plan and the Plan Supplement raises the question of whether this Court has jurisdiction over the plaintiff's claims relating to the Pension Plan. Although this issue has not been raised by the defendants, a court is required to dismiss an action whenever it appears to it that jurisdiction of the subject matter is lacking. Rule 12(h)(3), F.R.Civ.P. Of course, if the plaintiff lacks participant status, this could be viewed as a lack of subject matter jurisdiction. *See e.g., Nugent v. Jesuit High School of New Orleans*, 625 F.2d 1285, 1286 n.3 (5th Cir. 1980).

In *Nugent*, the Fifth Circuit held that a former employee, whose pension benefits were not vested at the time of her termination, was not a participant within the meaning of ERISA, despite the possibility that she might subsequently be rehired by the employer and become eligible for pension benefits. This conclusion was based on that panel's belief that the "may become eligible" language of §1002(7), *supra*, was intended to apply only to current employees. *Id.* at 1287.

The Ninth Circuit has held that a former employee, who has made no credible showing that he is vested *and* who does not claim that he will return to work, is not a participant as defined by ERISA. *Weiss v. Sheet Metal Workers Local 544 Pension Trust*, 719 F.2d 302, 304 (9th Cir. 1983), *cert. denied*, 104 S.Ct. 2347 (1984). That court, however, expressly refused to go as far as *Nugent*, leaving "open the question whether a former employee may qualify as a 'participant' by making a showing that he 'may become eligible' because there is a significant probability he may return to work and satisfy vesting requirements in the future." *Id.* at 303-04.

It is undisputed in the case at bar that the plaintiff's Pension Plan benefits were not vested under the terms of that plan at the time of his termination. However, the Pension Plan expressly provides that a former employee, who had participated in such plan but had terminated his employment before his benefits became vested, is to be reinstated as a participant in the vent he is re-employed by the employer. Section 2.02(a) of Pension Plan (Exhibit B of Defendants' Motion for Summary Judgment). We believe that a former employee, who had been a nonvested participant in a pension plan which specifically contemplates and provides for the contingency of that employee's rehire, should be considered a "participant" within the meaning of ERISA for the purpose of pursuing a claim under §1132(a)(3) of that Act. This seems particularly appropriate in the instant case whose very goal is to establish that the plaintiff should, in fact, have been vested at the time of his termination, a result which would clearly make him a "participant" under ERISA. To the extent that *Nugent*, and possibly *Weiss*, may be

in conflict with our interpretation of "participant" in this particular case, they are rejected.

The Pension Plan

A.

The plaintiff has alleged, *inter alia*, that the cliff vesting provisions of the Pension Plan violate the "Revenue Procedures which have been issued to interpret the provisions of ERISA." Specifically, the plaintiff contends that:

> By reason of the high turnover or quit rate among clerical employees, teller trainees and tellers and management trainees and management personnel The Bank and the Holding Company and the long term and highly compensated employees receive unjust benefits both in terms of tax deductions and interest income. Thus the cliff vesting provisions discriminate in favor of executive employees, officers and substantial shareholders and other highly compensated employees of The Bank in violation of ERISA as amended."

If true, these allegations would constitute a violation of the Internal Revenue Code (IRC). *See* 26 U.S.C. §401(a)(4); *Treas. Reg.* §1.401-1(b)(3). They would not, however, be violative of ERISA.

The plaintiff relies on 29 U.S.C. §1202(c) in his attempt to establish that the above allegations are violative of ERISA, as well as the IRC. However, that Statute only makes applicable to ERISA those treasury regulations promulgated under sections 410(a), 411, and 412 of Title 26, none of which are violated by the above recited allegations of plaintiff. There is no basis, under §1202(c) or elsewhere in ERISA, to find that the provisions of IRC §401 — which relate solely to the criteria for tax qualification under the Internal Revenue Code — are imposed on pension plans by the substantive terms of ERISA. In fact, the relevant Internal Revenue Code provision which *is* incorporated by §1202(c) expressly permits ten-year cliff vesting. See 26 U.S.C. §411(a)(2)(A); *Treas. Reg.* §1.411(a)-3(b).

It is widely held that IRC §401 does not create any substantive rights that an individual can enforce as a participant or a beneficiary under a tax qualified pension plan. *Cowan v. Keystone Employee Profit Sharing Fund*, 586 F.2d 888, 890 n.3 (1st Cir. 1978); *Berry v. Cadence Indus. Corp.*, 552 F.Supp. 1284, 1291 (E.D.Pa. 1982), *aff'd*, 720 F.2d 659 (3rd Cir. 1983); *Wiesner v. Romo Paper Prod. Corp.*, 514 F.Supp. 289, 291 n.2 (E.D.N.Y. 1981); *Vermeulen v. Central States, Southeast and Southwest Areas Pension Fund*, 490 F.Supp. 234, 237 n.6 (M.D.N.C. 1980). If the plaintiff wishes to have the Secretary of Labor investigate an alleged vesting requirement violation, his attention is directed to 29 U.S.C. §1132(b)(1).

B.

In addition to his contention that the ten-year cliff vesting provision of the Pension Plan is violative of ERISA because it contravenes certain IRC requirements, the plaintiff contends that such provision violates the Act itself. ERISA, however, expressly allows ten-year cliff vesting. 29 U.S.C. §1053(a)(2)(A). Given that the challenged vesting provision is clearly legal under the Act, we are without authority to review the Pension Plan for the purpose of determining whether it was reasonable, in light of the alleged discriminatory effect of the industry's high turnover rate, for the Pension Plan to utilize ten-year cliff vesting.

The Supreme Court has held that when neither the collective bargaining process nor the resulting employee benefit trust fund violates any federal statute, a federal court has not authority to modify the substantive terms of such fund pursuant to any kind of "reasonableness requirement." *UMWA Health & Retirement Funds v. Robinson*, 455 U.S. 562 (1982). A legal issue to be determined by this Court is whether the *Robinson* bar to a review of a trust fund's otherwise legal provisions is equally applicable to cases, such as the instant one, in which the fund was established unilaterally by the employer, as opposed to through the negotiation of a collective bargaining agreement.

The Sixth Circuit has held *Robinson* to be applicable in either context, *Moore v. Reynolds Metals Co. Retirement Program For Salaried Employees*, 740 F.2d 454, 456-57 (6th Cir. 1984), *cert. denied*, 105 S.Ct. 786 (1985), as apparently has the Eighth Circuit in an opinion authored by Senior Circuit Judge Thomas Fairchild, sitting by designation from the Seventh Circuit. *Vorpahl v. Retirement Plan For Employees of Union Oil*, 749 F.2d 1266, 1269-70 (8th Cir. 1984); *but see Hurn v. Retirement Fund Trust Of The Plumbing, Heating and Piping Indus. Of S. Cal.*, 703 F.2d 386, 389 (9th Cir. 1983) (*Robinson* inapplicable when plan provisions not established pursuant to collective bargaining); *Chambless v. Masters, Mates & Pilots Pension Plan*, 571 F.Supp. 1430, 1443 n.21 (S.D.N.Y. 1983) (recognizing *Hurn* holding).

We, like the Sixth and Eighth Circuits, believe that *Robinson* should control even in cases where the employer has unilaterally created the plan and its terms. An employer has no affirmative duty to provide employees with a pension plan. H.R.Rep. No..807, 93d Cong., 2d Sess., *reprinted in 1974 U.S. Code Cong. & Ad. News* 4670, 4677. Private parties, not the Government, control the manner in which benefits are provided, so long as the minimum protections of ERISA are heeded. *See Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 511-12 (1981). The decision of which minimum vesting standard to choose, or if the vesting provision should exceed the minimum requirements, as well as the decision of whether to provide a pension plan at all, has been left to the judgment of the employer or, in some cases, to the collective bargaining process. If the minimum requirements have been met, the court should not engage in second-guessing the wisdom, or even the reasonableness, of the plan.

Fiduciary Duty

Finally, the plaintiff alleges that the defendants, by delaying employee vesting for the longest permissible time (in order to take advantage of forfeitures and accrued interest), have breached a fiduciary duty to protect the interests of Reklau and those similarly situated. This allegation, in effect, is but

another way to challenge the "reasonableness" of the otherwise legal Pension Plan terms and, as such, it must be rejected for the same reasons discussed *supra*.

Moreover, the Seventh Circuit has specifically held that "[t]he administrator of a [pension] plan is a fiduciary only to the extent he is engaged in administration. The tasks of administration do not extend to negotiating the terms of the governing collective bargaining agreement." *United Indep. Flight Officers, Inc. v. United Air Lines, Inc.(UIFO-1)*, 756 F.2d 1262, 1268 (7th Cir. 1985). Although *UIFO-1* involved a pension plan which had been established through the collective bargaining process, we believe it should also be applied to the case at bar. The mere fact that an employer has named itself trustee of the pension plan does not prevent it from pursuing reasonable business behavior in unilaterally creating such a plan, so long as the terms of the plan are consistent with the requirements of ERISA and other applicable law. *Cf. Sutton v. Weirton Steel Div. of Nat'l Steel Corp.*, 567 F.Supp. 1184, 1201 (N.D.W.Va.), *aff'd*, 724 F.2d 406 (4th Cir. 1983), *cert. denied*, 104 S.Ct. 2387 (1984) (*quoted in UIFO-1*, 756 F.2d at 1268-69).

Because neither the Bank nor the Corporation was a fiduciary in establishing the provisions of the Pension Plan, no breach of fiduciary duty was possible in the creation, as opposed to the administration, of the plan.

For all of the foregoing reasons, the defendants' motion for summary judgment is granted and the motion to vacate the order certifying this cause as a class action is rendered moot.

Dated this 11th day of October, 1985.

/s/ S. Hugh Dillin
S. Hugh Dillin, Judge

Copies to:

Robert P. Johnstone, 1313 Merchants Bank Building, 11 South Meridian Street, Indianapolis, Indiana 46204
Douglass R. Shortridge, Suite 2250, One Indiana Square, Indianapolis, Indiana 46204

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

No. IP 84-1389-C

GARY W. REKLAU, On Behalf of Himself and All Others Similarly Situated,

Plaintiffs,

-vs-

MERCHANTS NATIONAL CORPORATION, A One Bank Holding Company, MERCHANTS NATIONAL BANK & TRUST COMPANY OF INDIANAPOLIS, A National Bank, In Its Individual Capacity and As Trustee, MERCHANTS NATIONAL BANK & TRUST COMPANY OF INDIANAPOLIS EMPLOYEES' PENSION PLAN.

Defendants.

JUDGMENT

The Court having this day filed its Entry in the above captioned matter in the following words and figures: (H.I.), now therefore,

IT IS CONSIDERED AND ADJUDGED that plaintiff take nothing by his complaint and said complaint is hereby dismissed.

IT IS FURTHER CONSIDERED AND ADJUDGED that the plaintiff pay the costs of this action.

Dated this 11th day of October, 1985.

/s/ S. Hugh Dillin
S. Hugh Dillin, Judge

Copies to:

Robert P. Johnstone, 1313 Merchants Bank Building, 11 South Meridian Street, Indianapolis, Indiana 46204

Douglass R. Shortridge, Suite 2250, One Indiana Square, Indianapolis, Indiana, 46204

86 1516

Supreme Court, U.S.
FILED
MAY 1- 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

October Term, 1986

No. 86-1516

GARY W. REKLAU, On Behalf of Himself
and All Others Similarly Situated,

Petitioners,

v.

MERCHANTS NATIONAL CORPORATION, et al.

Respondents.

On Petition For A
Writ Of Certiorari To The
United States Court Of Appeals
For The Seventh Circuit

PETITIONERS' SUPPLEMENTAL BRIEF

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1986

No. 86-1516

GARY W. REKLAU, On Behalf of Himself
and All Others Similarly Situated,

Petitioners,

v.

MERCHANTS NATIONAL CORPORATION, et al.

Respondents.

On Petition For A
Writ Of Certiorari To The
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For The Seventh Circuit

PETITIONERS' SUPPLEMENTAL BRIEF

The petitioner, Gary W. Reklau, on behalf of himself and all others similarly situated, submits this supplemental brief pursuant to Rule 22.6 of the Rules of The Supreme Court of the United States, citing three recent cases which support the Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

Since the printing of the Petition and its filing on March 18, 1987, three new cases have been decided in the intervening time period which affect the court's consideration of the Petition. The three cases, two from this court and one from the United States Tax Court, support the petition. In addition, the

Tax Court case establishes a conflict with the Seventh Circuit which should be resolved by this court. (NOTE: On April 17, 1987 the respondents waived the filing of a brief in opposition).

This Court has now clearly announced pre-emption by ERISA of all state causes of action against fiduciaries. — Under the Seventh Circuit Opinion Denying an ERISA cause of action, participants will be without a remedy.

This court decided two ERISA cases on April 6, 1987. In the first, *Pilot Life Insurance Co. v. Dedeaux*, No. 85-1043, (U.S., S.Ct., April 6, 1987), the court decided that ERISA pre-empts a suit under state common law for improper processing of a participant's claim. At page 2 of the slip opinion in *Pilot Life*, the court reemphasized the congressional intent:

> "In ERISA, Congress set out to
>
> > "protect . . . participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts." §2, as set forth in 29 U.S.C. §1001(b)."

The court further states that congress clearly expressed an intention that the civil enforcement provisions should be the exclusive vehicle for ERISA plan participants. The court finds support in an *amicus curiae* brief filed by the Solicitor General and states at page 10 of the slip opinion:

> "The Solicitor General, for the United States as *amicus curiae*, argues that Congress clearly expressed an intent that the civil enforcement provisions of ERISA §502(a) be the exclusive vehicle for actions by ERISA-plan participants and beneficiaries asserting improper processing of a claim for benefits, and that varying state causes of action for claims within the scope of §502(a) would pose an obstacle to the purposes and objectives of Congress. Brief for United States as *Amicus Curiae* 18-19. We agree.

* * *

> "The civil enforcement scheme of §502(a) is one of the essential tools for accomplishing the stated purposes of ERISA.[3]
>
> * * *
>
> "Under the civil enforcement provisions of §502(a), a plan participant or beneficiary may sue to recover benefits due under the plan, to enforce the participant's rights under the plan, or to clarify rights to future benefits. Relief may take the form of accrued benefits due, a declaratory judgment on entitlement to benefits, or an injunction against a plan administrator's improper refusal to pay benefits. A participant or beneficiary may also bring a cause of action for breach of fiduciary duty, and under this cause of action may seek removal of the fiduciary. §§502(a)(2), 409. In an action under these civil enforcement provisions, the court in its discretion may allow an award of attorney's fees to either party. §502(g). See *Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134, 147 (1985)."

Massachusetts Mutual was quoted extensively in the petition. The open question suggested by Mr. Justice Brennan, with whom Justices White, Marshall and Blackmun joined, in the concurring opinion with regard to implied causes of action is reemphasized by the *Pilot Life* case. Since the federal courts are now the only available forum which has jurisdiction to address the many and varied claims which will arise under ERISA, this Court should now address the questions raised in the Seventh Circuit opinion.

On the same day, this court decided *Metropolitan Life Insurance Co. v. Taylor*, No. 85-687, (U.S., S.Ct., April 6, 1987). In the *Metropolitan Life* case, the court found, on the basis of *Pilot Life*, that not only are common law claims preempted by ERISA but such claims are also removable to federal court. The court states at page 4 of the slip opinion:

> "Under our decision in *Pilot Life Ins. Co. v. Dedeaux*, *ante*, p. _____, Taylor's common law contract and tort claims are pre-empted by ERISA. This lawsuit "relate[s] to [an] employee benefit plan." §514(a), 29 U.S.C. §1144(a).

It is based upon common law of general application that is not a law regulating insurance. See *Pilot Life Ins. Co. v. Dedeaux*, *ante*, at _____ - _____. Accordingly, the suit is pre-empted by §514(a) and is not saved by §514(b)(2)(A). *Ante*, at _____. Moreover, as a suit by a beneficiary to recover benefits from a covered plan, it falls directly under §502(a)(1)(B) of ERISA, which provides an exclusive federal cause of action for resolution of such disputes."

The court goes on to state at page 6 of the slip opinion that ERISA's civil enforcement provisions, which parallel section 301 of the Labor, Management Relations Act, are extremely broad as follows:

"But the language of the jurisdictional subsection of ERISA's civil enforcement provisions closely parallels that of §301 of the LMRA. Section 502(f) says:

"The district courts of the United States shall have jurisdiction, without respect to the amount in controversy or the citizenship of the parties, to grant the relief provided for in subsection (a) of this section in any action." 29 U.S.C. §1132(f).

Cf. §301(a) of the LMRA, 29 U.S.C. §185(a). The presumption that similar language in two labor law statutes has a similar meaning is fully confirmed by the legislative history of ERISA's civil enforcement provisions."

These cases point out the broad remedial scope of ERISA. The cases further point out not only is there a pre-emption of state actions against trustees or fiduciaries for breach of duties and cases filed in state court are removable irrespective of the language in the complaint. Thus these two cases sweep into the federal court system virtually all claims of plan participants. These intervening cases should now be considered by this court as affecting the pending petition and the narrow view of the Seventh Circuit.

The Tax Court has now interpreted ERISA Title I (Labor Standards and Guidelines) and Title II (Internal Revenue Code) as one integrated whole to be con-

strued together — this proper statutory interpretation conflicts with the Seventh Circuit.

Since the filing of petitioners' original petition, the United States Tax Court has decided a case which supports petitioners' position that the labor and tax provisions of ERISA must be read together as one integrated statute to correct prior abuses. In the case of *Calfee, Halter & Griswald v. Commissioner*, 88 TC No. 35, filed March 23, 1987, CCH Dec. 43,786, the Tax Court held that ERISA is an integrated statute which should be construed and applied as a whole. The issue in that case was whether or not a prominent Cleveland law firms' pension plan was disqualified because it used Title I ERISA guidelines which the commissioner argued were contrary to the Title II revenue code provisions. A number of administrative disqualification cases were consolidated and by order by the chief judge the cases were assigned to Judge Williams for decision and opinion.

The Tax Court opinion carefully reviews the history of ERISA and the Tax Court overruled the Commissioners narrow interpretation of ERISA.

The Tax Court's analysis of ERISA affects the pending petition for writ of certiorari and should be considered in determining whether or not the Seventh Circuit's perception of ERISA should be reviewed. The Seventh Circuit adopted the district court's opinion which states as follows:

> "We agree with the district court's assessment of this issue:
>
> > "There is no basis, under §1202(c) or elsewhere in ERISA, to find that the provisions of IRC §401 — which relate solely to the criteria for tax qualification under the Internal Revenue Code — are imposed on pension plans by the substantive terms of ERISA."
>
> *Reklau v. Merchants Nat'l Corp.*, No. IP 84-1389-C, Mem. Op. at 8, (S.D. Ind. Oct. 11, 1985). We are convinced that had Congress intended that §401 of the I.R.C. be applicable to ERISA, it would have so stated in clear and unam-

biguous language as it did in 29 U.S.C. §1202(c) with §§410(a), 411 and 412 of the I.R.C.[9] We thus refuse to read §401(a) of the I.R.C. as applicable to ERISA." (A-7) 808 F.2d 628, 631.

The Seventh Circuit analysis of ERISA clearly conflicts with the Tax Court which stated Title I and Title II of ERISA were drafted in concert and to sever the labor law standards and guidelines from the tax law would result in an aberration as argued by the Tax Commissioner. While the opinion is available, petitioner quotes from the Tax Court opinion at length as follows:

> "ERISA was enacted to remedy perceived defects in the private retirement system. ERISA was designed to protect the rights of employees participating in private retirement plans, and to make the system more fair and more secure by providing standards for the organization and administration of plans, vesting rights, plan funding and plan termination. See ERISA section 2 at 88 Stat. 832. The bill was considered by the House Committee on Ways and Means and the House Committee on Education and Labor, and their Senate counterparts, and resulted from combining two separate bills — one to establish Federal labor law standards for the establishment and operation of pension plans, to be administered primarily by the Department of Labor; and one to amend the Internal Revenue Code of 1954 with respect to the qualification of pension plans for Federal tax purposes, to be administered by the Internal Revenue Service.
>
> "Title I of ERISA sets forth guidelines and standards governing the establishment and operation of pension plans. See generally 88 Stat. 832 et seq. The Department of Labor is given principal authority to administer and enforce the provisions of this title. See generally ERISA section 500 et seq., 88 Stat. 891 et seq. Title II of ERISA specifically amends the Internal Revenue Code of 1954 and, like Title I, sets forth guidelines and standards governing the establishment and operation of pension plans qualified for Federal income tax purposes. As reported by the House Committee on Ways and Means:

> This bill and the bill reported by the Committee on Education of Labor, are expected to jointly deal with participation, vesting, and funding with respect to pension plans. In these areas, this bill has been worked out in close coordination with the version of the bill expected from the Committee on Education and Labor to be sure that the general standards provided in these three areas are the same.*** H. Rept. 93-807, 93d Cong., 2d Sess. 1 (1974); 1974-3 (Supplement) C.B. 236.

"Although the fiduciary standards of ERISA section 403(c) were not enacted as part of the Internal Revenue Code, the statute is an integrated whole which, absent clear expression of contrary legislative purpose, should be construed and applied as a whole. The legislative history of the statute confirms that the fiduciary standards were developed in coordination among the labor law-writing committees and the tax-writing committees: (Emphasis Added).

> "Because of the *expected coordination* between your committee's bill and that of the Education and Labor Committee, no action is taken in this bill to deal with the general subjects of fiduciary standards, plan termination insurance, and reporting and disclosure, which are dealt with in H.R. 12906. [Emphasis added. H. Rept. 93-807, 93d Cong., 2d Sess. 1 (1974); 1974-3 (Supplement) C.B. 236.]

"Title I and Title II of ERISA were drafted in concert. To sever the Act as if Title I were unrelated to the tax law would result in the aberration argued for by respondent, viz, the presence in any plan of certain legal standards set forth in Title I would disqualify the plan for Federal income tax purposes. ERISA's fundamental purpose is to make pension plans more fair and secure for employees and to provide incentives through the tax law for employers to establish and participate in such plans. This balance, achieved by the legislature, would be upset by reading out of the state, for Federal income tax purposes, the reversionary clauses permitted by ERISA section

403(c)(2). See H.Rept. 93-807 at 2 ("Not only have the standards in the two bills been coordinated ***"). The standards of Title I and of Title II could hardly be viewed as having been coordinated, however, if an otherwise qualified plan (i.e., fully compliant with the fiduciary standards and other Internal Revenue Code requirements) could not qualify under Title II by virtue of having adopted the standards of Title I. Under respondent's view of ERISA only plans that ignored the standards of ERISA section 403(c)(2) would be qualified.

* *

"A grant of administrative jurisdiction pursuant to Title II of ERISA does not carry with it a grant of authority to ignore the standards and guidelines set forth in Title I of ERISA. This is especially true because the standards of Title I and Title II were closely coordinated by Congress specifically to develop a unified set of rules. Therefore, we decline to accept respondent's position."

Conclusion

The intervening court opinions of this court and the Tax Court, decided and handed down since the filing of the original petition, affect and support the position that this court should grant certiorari and review this important area of the law. The issues raised in the petition are of national concern and should be addressed by this court for the guidance of employers, employees and their advisors.

Respectfully submitted,

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